No. 88-61

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

NATIONAL COAL ASSOCIATION AND
EDISON ELECTRIC INSTITUTE,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS NATIONAL COAL ASSOCIATION AND EDISON ELECTRIC INSTITUTE

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September 30, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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ARGUMENT

As Petitioners explained in their Petition for Certiorari, the D.C. Circuit in this case essentially required that sources conduct case-by-case demonstrations of stack height credit, when the plain language of § 123 of the Clean Air Act and the Agency's interpretation of that provision contemplate a general "good engineering practice" (GEP) rule.[1] As Petitioners explained, the lower court's decision in this regard ignored basic principles of law restricting judicial intervention in agency action, as embodied in *Chevron U.S.A., Inc. v. NRDC*[2] and the doctrines of law of the case and *res judicata*.

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[1] Petition for a Writ of Certiorari at 18-20 (hereinafter "Pet. —").

[2] 467 U.S. 837 (1984) (*"Chevron"*).

In response to the Petition, Federal Respondents agree that "EPA's decision to grandfather within-formula stack height increases [from demonstration requirements] was a reasonable one . . . under Section 123 . . . and should have been sustained by the court of appeals."[3] Federal Respondents also agree that an agency "should not be required to relitigate the merits of previously adopted regulatory choices every time it engages in supplemental rulemaking after a remand," and state that the Agency did in fact "originally interpret[] *Sierra Club*'s affirmance of the [earlier] grandfathering provision as effectively encompassing" the rule set aside by the more recent D.C. Circuit decision.[4]

Nevertheless, Federal Respondents and Respondents Natural Resources Defense Council, *et al.* (hereinafter "NRDC")[5] oppose certiorari. Contrary to representations made before the D.C. Circuit,[6] Federal Respondents now contend that this case involves only a "fact-specific ruling [that] is not of general importance."[7] Furthermore, contrary to its earlier view of *Sierra Club*,[8] the Agency now believes that that decision is "somewhat ambiguous" on the issue of grandfathering previous stack height increases.[9] For the reasons discussed below,

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[3] Brief for Federal Respondents in Opposition at 25-26 (September 12, 1988) (hereinafter "Fed. Resp. Brief ——").

[4] Fed. Resp. Brief 26; Sierra Club v. EPA, 719 F.2d 436 (D.C. Cir. 1983), *cert. denied sub nom.* Alabama Power Co. v. Sierra Club, 468 U.S. 1204 (1984).

[5] Brief For Respondents in Opposition (February 12, 1988) (hereinafter "NRDC Brief ——").

[6] *See generally* Respondents' Petition for Rehearing (March 7, 1988) (hereinafter "EPA Rehearing Petition ——"). The Rehearing Petition is printed in the Appendix to this Brief.

[7] Fed. Resp. Brief 26.

[8] *See generally* EPA Rehearing Petition.

[9] Fed. Resp. Brief 26.

Respondents' arguments in opposition to certiorari are without merit.

I. CERTIORARI SHOULD BE GRANTED TO ADDRESS THE D.C. CIRCUIT'S FAILURE TO APPLY THIS COURT'S *CHEVRON* DOCTRINE AND TO AFFORD DEFERENCE TO EPA'S REASONABLE INTERPRETATION OF § 123.

As explained in the Petition for Certiorari, the D.C. Circuit has twice addressed the Agency's rules implementing § 123 of the 1977 Clean Air Act Amendments—a seemingly simple and straightforward statutory provision requiring EPA to establish rules within six months providing for "good engineering practice" stack height credit. In successive opinions, the D.C. Circuit, while recognizing that neither § 123 nor its legislative history is a model of clarity, has interpreted this provision to restrict the scope of the Agency's authority to proceed by general rule. In *Sierra Club*, the court required more extensive use of case-by-case demonstrations for future stack height increases. In its most recent decision, the court extended this holding to stack height increases that took place before its *Sierra Club* decision.

In response to the D.C. Circuit's ever-expanding instructions on what EPA's stack height credit regulations must provide, Federal Respondents insist that EPA's implementation of § 123 with respect to "within-formula stack height increases" was "reasonable" and "should have been sustained by the court of appeals." [10] Petitioners agree with Federal Respondents in this respect. Petitioners disagree, however, with Federal Respondents' view that the D.C. Circuit's instructions on how to implement this technical statutory provision reflect due regard for basic standards governing judicial review.[11]

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[10] *Id.* 25-26.

[11] *See id.*; Pet. 18-22.

In *Chevron*, this Court announced that a reviewing court must give deference to an agency's reasonable interpretation of its enabling statute, even if the reviewing court itself would have adopted another interpretation of that statute. Under *Chevron*, therefore, the lower court was required to defer to EPA's reasonable interpretation of the Act to allow use of a generally applicable GEP formula for all sources with pre-October 1983 stacks.[12]

Review by this Court is necessary to address the D.C. Circuit's failure to abide by or even acknowledge the *Chevron* deference principle. Moreover, since there has been confusion in the circuit courts as to the scope and applicability of *Chevron* in the aftermath of this Court's decision in *INS v. Cardoza-Fonseca*,[13] granting certiorari in this case would give the Court an opportunity to clarify the scope of the *Chevron* doctrine.[14]

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[12] This interpretation of § 123 was in fact adopted by EPA from the pre-*Chevron Sierra Club* decision, which did not question the use of the formula for pre-October 1983 stacks. *See infra* pp. 6-9.

[13] *See* Pet. 21 n.58; INS v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987).

[14] In contrast to Federal Respondents' recognition that its implementation of § 123 was reasonable and should have been upheld by the lower court, NRDC, in opposing certiorari, argues that the lower court's decision "is not based on its adoption of a statutory interpretation conflicting with the agency's interpretation," but rather upon EPA's failure to justify the grandfathering provision providing that sources with pre-October 1983 stacks may use the GEP formula. NRDC Brief 8. NRDC ignores that the "crucial consideration" in an agency's decision to adopt a grandfathering rule is the "statutory interest" factor. *Sierra Club*, 719 F.2d at 468. Accordingly, in allowing sources with pre-October 1983 replacement stacks to use the GEP formula, EPA of necessity had to find that rule to be consistent with § 123 as well as with the lower court's remand order. EPA did just that. 50 Fed. Reg. 27900 (1985), Appendix to Petition for Certiorari at 103a (hereinafter "App. ——"). EPA therefore adopted as its own the *Sierra Club* court's inter-

While agreeing that the Agency's implementation of § 123 was reasonable and should have been upheld by the D.C. Circuit, Federal Respondents argue that this case represents only "a fact-specific ruling [that] is not of general importance," and therefore not worthy of review by this Court.[15] This assertion is surprising in light of Federal Respondents' representation to the D.C. Circuit in EPA's Petition for Rehearing that that court's further instructions on how to define GEP stack height credits has "serious consequences for the Agency."[16] As Federal Respondents then explained, the lower court's ruling would "deprive[] a significant number of sources of the grandfathering protection conferred in *Sierra Club*," and would require the Agency "to devote substantial time and resources" to yet another judicially-inspired approach to § 123 implementation.[17] Federal Respondents offer no explanation as to why these views have changed; nor do they offer any response to Petitioners' extensive discussion of the importance of this case.[18]

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pretation of § 123 to allow the use of the GEP formula by sources with pre-October 1983 stacks. *See infra* pp. 6-9.

The D.C. Circuit in this case rejected EPA's interpretation of § 123. Stating an inaccurate view of the *Sierra Club* court's interpretation of § 123, reached as a result of NRDC's mischaracterization of that decision, *see infra* note 24, the court held that sources with pre-October 1983 replacement stacks could not use the GEP formula. NRDC v. Thomas, 838 F.2d 1224, 1244-46 (D.C. Cir. 1988), App. 36a-40a. It is this continued reinterpretation of § 123 by the lower court, in a manner contrary to the Agency's interpretation of that provision, that has created the need for certiorari.

[15] Fed. Resp. Brief 26.

[16] EPA Rehearing Petition 13, Appendix to this Brief at 12a.

[17] *Id.*

[18] *See* Pet. 24-26. NRDC, on the other hand, does attempt to respond to Petitioners' assertions regarding the importance of this case. NRDC Brief 12-13. NRDC first argues that the court

In sum, the D.C. Circuit failed to show proper deference to EPA's interpretation of § 123, under which the GEP formula retained its vitality. Instead, it rejected EPA's rule without considering the *Chevron* doctrine, rendering the GEP formula explicitly endorsed by Congress in § 123 and its legislative history unavailable for most sources.[19] As a result, after a decade of § 123 rulemaking proceedings, EPA must again reallocate its scarce resources to development of rules implementing a straightforward statutory provision for which Congress expected final rules to be in place in 1978. This Court should grant certiorari to end the confusion over § 123 and to clarify the proper roles of federal courts and agencies in interpreting a statutory provision granting the agency broad rulemaking powers.

II. CERTIORARI SHOULD BE GRANTED TO ENSURE THAT THE DOCTRINES OF LAW OF THE CASE AND RES JUDICATA ARE APPLIED IN JUDICIAL REVIEW OF AGENCY REMAND PROCEEDINGS.

During the remand rulemaking following *Sierra Club* and in the subsequent litigation in the court below, EPA consistently held the view that the court in *Sierra Club*

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did not require case-by-case demonstrations or a multi-layered grandfathering scheme in lieu of a generally applicable GEP formula, so long as EPA justifies the formula. As explained in the Petition, however, Pet. 15 n.26, the burden that the lower court has created for justification of a generally applicable formula will make it difficult, as a practical matter, for EPA to justify the current GEP formula.

Second, NRDC argues that even if case-by-case demonstrations were required, they would not be burdensome because mathematical models could be used instead of wind tunnels or field studies. This claim makes no sense—the models that NRDC wants EPA to use require that stack height be an input to the model; the models cannot be used to assess what GEP stack height is.

[19] *See* Pet. 19-20; H.R. Rep. No. 564, 95th Cong., 1st Sess. 143 (1977).

had affirmed the use of the GEP formula for all stacks except future replacement stacks that increase stack height.[20] EPA's 1985 rules reflected this view of the lower court's opinion by (1) allowing use of the traditional 2.5H GEP formula for any pre-1979 stack upon a showing of reliance; (2) allowing, subject to a discretionary demonstration requirement, use of the refined H + 1.5L GEP formula for any pre-October 1983 stack not able to use the 2.5H formula, and for any post-October 1983 original stack; and (3) requiring demonstrations for post-October 1983 replacement stacks with increased height.

Ignoring the Agency's view of *Sierra Club* and § 123, however, the D.C. Circuit set aside EPA's rules allowing GEP formula credit for past stack height increases. Petitioners and Federal Respondents strongly objected to the D.C. Circuit's reversal of its prior position, explaining more fully in petitions for rehearing how the decision below conflicted with the *Sierra Club* decision that had guided the remand rulemaking.

Federal Respondents now suggest that *Sierra Club* "is in fact somewhat ambiguous" on whether use of the GEP formula for pre-October 1983 stacks is consistent with § 123,[21] and on this basis suggest that the doctrines of law of the case and *res judicata* are not important to this case. In light of the history of this proceeding, Federal Respondents' eleventh-hour reversal of position should, if anything, lead this Court to examine this case all the more closely.

Petitioners and others participated in the remand rulemaking based on the premise that the *Sierra Club* opinion upheld the Agency's rule allowing use of the 2.5H GEP formula for all sources with pre-1979 stacks, as

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[20] *See* EPA Rehearing Petition 6-13, Appendix to this Brief at 5a-11a; Fed. Resp. Brief 26 (the Agency "originally interpreted" *Sierra Club* in this manner).

[21] Fed. Resp. Brief 26.

long as the Agency limited use of that rule to sources that had relied on that formula.[22] The D.C. Circuit, however, gave no weight to the view of *Sierra Club* that guided the remand rulemaking[23] nor to the history of that rulemaking in remanding for yet additional rulemaking in accordance with its contrary view of that case.[24] If rulemaking participants are subject to ever-

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[22] *See* Pet. 10-11, 23.

[23] *See* EPA Rehearing Petition 6-13, Appendix to this Brief at 5a-11a.

[24] In contrast to Petitioners and Federal Respondents, NRDC disagrees that the *Sierra Club* court authorized use of the 2.5H formula for all pre-1979 stacks. NRDC reads the portion of *Sierra Club* addressing stack height increases as applying to all post-1970 stacks, and argues that this reflects its arguments in *Sierra Club*. *Id.* 8-9 and note 16.

NRDC's arguments are belied by its 1982 brief and the *Sierra Club* decision. In the 1981 rulemaking and in its 1982 brief, NRDC argued that EPA in its 1982 rules should have adopted the Agency's "well-reasoned 1980 policy," NRDC Brief in *Sierra Club* at 30 (October 25, 1982); *see* Comments of NRDC on the 1981 Proposed Rules at 13 (November 3, 1981), which would have required demonstrations, in lieu of automatic use of the GEP formula, for increases in stack height *in the future*. Pet. 7-8; 45 Fed. Reg. 42282 (1980) ("EPA has concluded that an existing source increasing its stack height should not automatically receive credit for the increase on the basis of the GEP formula. *In the future*, any source seeking to raise its stack . . . will be required to conduct a fluid modeling study or field study to demonstrate the GEP height . . . ." (emphasis added)). NRDC's 1982 brief therefore presented its argument in the *future* tense. *See, e.g.*, NRDC Brief in *Sierra Club* at 27 ("EPA may not apply its rule of thumb formula to sources *wishing to raise* existing stacks" (emphasis added).).

The *Sierra Club* decision reflects NRDC's arguments. Thus, the court, agreeing with NRDC's argument on stack height increases, remanded for EPA to consider whether demonstrations should be required "before stack heights may be raised . . . ." *Sierra Club*, 719 F.2d at 460. Use of the future tense here con-

changing interpretations of earlier court decisions in litigation following remand rulemaking, the administrative rulemaking process will have no certainty and no end. In this sense, EPA's willingness to change its position so easily in light of a decision from the D.C. Circuit that the Agency only six months ago vigorously contended was inconsistent with *Sierra Club*[25] shows that certiorari is important to provide guidance on the scope of judicial review of agency decisions during remand rulemaking.

In sum, Federal Respondents were required in the court below to do something that they clearly find disturbing: "relitigate the merits of previously adopted regulatory choices" following a remand rulemaking.[26] Against this background, this Court should settle that the doctrines of law of the case and *res judicata* apply in litigation over rules promulgated on remand from an earlier court decision.

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firms that neither NRDC nor the court was questioning use of the GEP formula for past stack height increases.

Moreover, in upholding use of the traditional 2.5H formula for pre-1979 stacks where reliance could be shown, the court in *Sierra Club* did not attempt to distinguish between pre-1979 replacement stacks (with increased stack height) and pre-1979 original stacks. Rather, the court's decision applied to all pre-1979 stacks. 719 F.2d at 467 ("We hold that the statute does not prevent EPA from allowing its past rule [the 2.5H formula] to be applied to stacks built before" 1979). Reading the *Sierra Club* decision as a whole therefore shows that NRDC's argument is without merit.

[25] *See generally* EPA Rehearing Petition.

[26] Fed. Resp. Brief 26.

CONCLUSION

For the foregoing reasons and those discussed in the Petition for Certiorari, this Court should grant certiorari.

Respectfully submitted,

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September 30, 1988

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1488 and consolidated cases

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*
Petitioners,

v.

LEE M. THOMAS, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

RESPONDENTS' PETITION FOR REHEARING

On Petition for Review of Regulations of the
United States Environmental Protection Agency

The United States Environmental Protection Agency and Lee M. Thomas, Administrator (hereinafter "EPA" or "the Agency"), hereby petition this Court for rehearing pursuant to the provisions of Fed. R. App. P. 40 and Local Court Rule 15. EPA files this petition to bring to the attention of this Court a conflict between its January 22, 1988, decision and its previous decision in *Sierra Club* v. *EPA*, 719 F.2d 436 (D.C. Cir. 1983), *cert. denied*, 468 U.S. 1204 (1984), relating to the permissibility of grandfathering pre-1979 within-formula stack height increases.

STATEMENT OF THE ISSUE

This Court's January 22, 1988, decision remanded to the Agency three provisions of its July 8, 1985, stack height regulations including that governing the "grandfathering of pre-October 1, 1983, stack increases from demonstration requirements" (Slip op. at 63). In *Sierra Club* this Court affirmed EPA's decision to grandfather stacks in existence on January 12, 1979. In the 1985 rulemaking and consistent with its interpretation of the *Sierra Club* decision, EPA required stacks constructed prior to January 12, 1979, to demonstrate reliance on the 2.5H formula [1] in order to receive full credit under that formula, and authorized credit to the H + 1.5L [2] formula for all other pre-October 1, 1983,[3] stacks along with discretionary authority for the permitting authority to require additional studies. In establishing these requirements, the Agency did not distinguish between "original design" stacks and stack "increases." This Court's opinion, however, concludes that such a distinction is appropriate, in conflict with its prior decision in *Sierra Club*. EPA estimates that more than 150 sources will be affected by this portion of the Court's decision.

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[1] Section 123 of the Clean Air Act limits credit for stack height to that dictated by "good engineering practice," which is limited to

> two and a half times the height of [the] source [2.5H] unless the owner or operator of the source demonstrates . . . that a greater height is necessary as provided under the preceding sentence.

42 U.S.C. § 7423(c).

[2] The "H + 1.5L" formula gives credit for the height of the nearby structure plus one-and-one-half times the lesser of the height or width of the structure.

[3] The Court's opinion refers to October 1, 1983, in apparent reliance on a typographical error in the Agency's original *Federal Register* notice. That error has been corrected to October 11, 1983, the date of the *Sierra Club* decision, and so appears in the re-codified regulations at 40 C.F.R. § 51.100(kk)(2).

BACKGROUND

The Court's January 22, 1988, decision is its second addressing EPA's efforts to implement section 123 of the Clean Air Act, 42 U.S.C. § 7423, which governs the award of credit for stack height in setting emission limitations under the Act. Upon investigation, the Agency discovered that the statutory 2.5H formula overestimated "good engineering practice" stack height for some sources. Accordingly, it promulgated a refined formula of H + 1.5L as part of its June 9, 1982, stack height regulations. 40 C.F.R. § 51.1(ii)(2)(i), 47 Fed. Reg. 5,868 (J.A. 71). The June 9, 1982, regulations were challenged by Sierra Club, the Natural Resources Defense Council, Inc., and the Commonwealth of Pennsylvania on numerous grounds and in October 1983, the Court issued its decision affirming portions of the regulations, reversing two provisions, and remanding others to EPA for reconsideration. *Sierra Club* v. *EPA*, 719 F.2d 436 (D.C. Cir. 1983), *cert. denied*, 468 U.S. 1204 (1984).

Two aspects of the decision in *Sierra Club* v. *EPA* are here relevant. First, the Court affirmed EPA's decision to give stack height credit up "2.5H" for stacks in existence on January 12, 1979, when EPA's refined formula was proposed, providing the source could show it actually relied on the 2.5H formula in constructing its stack. *See id.* at 468. In addition, the Court directed the EPA to reconsider the issue of "whether . . . demonstrations are necessary before stack heights may be raised, even if the final height will not exceed formula height." *Id.* at 459-60.

In response to the Court's remand, the Agency promulgated revised stack height regulations on July 8, 1985. *See* 50 Fed. Reg. 27,892 (1985). In those revised regulations EPA reformulated its grandfathering provision for pre-January 12, 1979, stacks to take actual reliance into account:

> "Good engineering practices" (GEP) stack height means . . .
>
> For stacks in existence on January 12, 1979, and for which the owner or operator had obtained all applicable permits or approvals required under 40 C.F.R. Parts 51 and 52,
>
> Hg=2.5H,
>
> provided the owner or operator produces evidence that this equation was actually relied on in establishing an emission limitation . . . .

40 C.F.R. § 51.1(ii)(2)(i), 50 Fed. Reg. 27,906 (J.A. 26). With respect to a source which seeks to increase an existing stack up to the levels established by the "good engineering practice" formula after October 1, 1983, EPA requires that the source perform a fluid modeling demonstration to justify this credit. 40 C.F.R. § 51.1(kk)(2), 50 Fed. Reg. 27,907 (J.A. 27). Within-formula stack height increases accomplished prior to October 1, 1983, are subject to the provisions of 40 C.F.R. § 51.1(ii)(2)(1), which imposes a ceiling of 2.5H on stack height credit for pre-January 12, 1979 stack height increases where the source can demonstrate reliance on the 2.5H formula. Pre-January 12, 1979, sources which can not meet the reliance requirement, and post-January 12, 1979, increases are limited to stack height credit of H + 1.5L. 40 C.F.R. § 51.1(ii)(2)(ii), 50 Fed. Reg. 27,906 (J.A. 26).

Following promulgation of the July 8, 1985, regulations, eleven petitions for review were filed by environmental, state and industry petitioners. The Natural Resources Defense Council, Inc., Sierra Club, the Environmental Defense Fund, and several states (hereinafter collectively referred to as "NRDC") challenged the two provisions discussed above. First, and notwithstanding this Court's decision in *Sierra Club* v. *EPA*, NRDC challenged EPA's decision to retain a grandfathering provi-

sion for stacks in existence on January 12, 1979, based on its argument that all sources must "control first" before receiving any credit for stack height. *See* NRDC br. at 51-54. In the alternative, NRDC challenged EPA's decision to retain a grandfathering provision for sources which increased their stacks prior to January 12, 1979, up to 2.5H, and to permit grandfathering of all other stacks constructed before October 1, 1983, up to H + 1.5L. *Id.* at 31-35.

In its January 22, 1988, decision, the Court reaffirmed its earlier decision in *Sierra Club* v. *EPA*, that sources may continue to utilize the 2.5H formula in calculating their emission limitations for stacks in existence on January 12, 1979, providing they demonstrate reliance on that formula. *See* Slip op. at 42. The Court went on, however, to impose the new requirement that before a source could take advantage of this grandfathering provision it must have been originally designed to 2.5H. *Id.* at 40. Accordingly, EPA must now reconsider its decision to grandfather pre-January 12, 1979, sources which increased their stacks up to formula height, regardless of whether the sources relied on the 2.5H formula in increasing stacks.

ARGUMENT

I. *SIERRA* V. *EPA* DOES NOT PROVIDE A BASIS FOR DISTINGUISHING BETWEEN ORIGINALLY-DESIGNED AND INCREASED STACKS.

In *Sierra Club* v. *EPA*, this Court upheld EPA's decision to grandfather *all stacks in existence* on January 12, 1979, up to 2.5H provided the affected sources demonstrated reliance on the statutory formula in constructing their stacks. *See* 719 F.2d at 468. "Stacks in existence" necessarily include stacks originally constructed to 2.5H and stacks subsequently raised to 2.5H. In affirming this grandfathering provision, the *Sierra Club*

court did not distinguish between original and increased stacks, and certainly never suggested that pre-January 12, 1979, original and increased stacks should be subjected to different grandfathering provisions.[4] Nor did NRDC advance such an argument in the earlier case. *See* NRDC br. at 27-31, filed in *Sierra Club* v. *EPA*.

NRDC did challenge EPA's decision in the 1982 regulations not to impose a fluid modeling demonstration requirement for stack height increases. *See* 719 F.2d at 456-59. NRDC's challenge, however, appeared to be limited to the Agency's failure to impose a demonstration requirement for prospective stack height increases. *See* NRDC br. at 30, filed in *Sierra Club* v. *EPA* ("EPA has not met its burden of showing why its well-reasoned 1980 policy . . . may now be discarded."). The 1980 policy referenced by NRDC was purely *prospective* in application. Under this 1980 policy, pre-January 12, 1979, stack height increases would certainly have been grandfathered. *See* 45 Fed. Reg. 42,279 (June 24, 1980). *See also* EPA br. at 34 n.22.

The *Sierra Club* Court remanded to the Agency the question of whether "demonstrations are necessary before stack heights may be raised, even if the final height will not exceed formula height." 719 F.2d at 459-60.

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[4] In fact, when the *Sierra Club* court remanded the 2.5H grandfathering provision based on the need to demonstrate reliance, it stated that there are 171 stacks over 500 feet which were built between 1970 and 1979, citing a report based on FAA data listing all stacks over 61 meters built between 1970 and 1979. *Id.* at 468. It seems clear that the FAA listed all stacks regardless NRDC br. at 9 (168 sources increased their stack height after of whether they were original or increased stacks. *Compare* 1970). The Court did not state that the reliance requirement only related to the subset of these stacks which were originally designed to 2.5H. Thus, the figure the *Sierra Club* court cites as sources needing to show reliance in order to be grandfathered was not limited to original stacks, but included all stacks constructed before 1979.

Because NRDC did not challenge EPA's decision not to require demonstrations for any pre-January 12, 1979, stack height increases, and the Court did not distinguish among "stacks in existence", EPA was not required to reevaluate a grandfathering provision for pre-January 12, 1979, stack height increases. Nothing in this Court's *Sierra Club* opinion suggests a different interpretation.

Moreover, a review of the rulemaking record makes clear that the Agency did not consider this an open issue. In its November 9, 1984, proposal, the Agency stated that it did not intend to require demonstrations for prospective stack height increases. *See* 49 Fed. Reg. 44,883 (J.A. 6). In its final rule, the Agency altered its position and imposed a demonstration requirement for all stacks seeking to raise existing stack height after October 11, 1983. NRDC submitted comments (J.A. 851) arguing that the regulations should not permit the grandfathering of pre-1979 stack height increases. As the *Sierra Club* opinion on the issue of grandfathering sources to 2.5H was considered to have related to *all* sources built before 1979, the Agency did not distinguish between original and increased stacks in its treatment of the reliance question in the preamble to the final rule:

> The EPA intends to "grandfather" any source that relied on the formula in building its stack before the date of EPA's 1979 proposal from the effect of this discretionary re-examination requirement.
>
> Only in that proposal did EPA first suggest that such a discretionary reexamination provision might be included in the final rule. The retroactivity analysis set out earlier therefore supports exempting stacks built in reliance on EPA guidance before that date from discretionary reexamination. Indeed, a failure to "grandfather" these sources would lead to the paradoxical result that a source that had built a GEP stack under the traditional EPA formula

> would have its direct reliance interests protected by the "grandfather" provision previously upheld by the court, but could then lose that "grandfathered" credit through a case-specific demonstration requirement showing that the traditional formula was somewhat inaccurate—the very reason behind the change in the formula properly found non-retroactive by EPA earlier.

50 Fed. Reg. 27,900 (J.A. 20). This discussion plainly shows that EPA did not view the grandfathering of all pre-1979 sources showing reliance to be an open issue. It was resolved by *Sierra Club*, and the Agency declined to go beyond the Court's instructions.

II. NRDC CANNOT BE PERMITTED TO CHALLENGE PRE-JANUARY 12, 1979, STACK HEIGHT INCREASES IN THIS CASE.

In *Sierra Club* v. *EPA*, this Court upheld EPA's decision to grandfather pre-January 12, 1979, stacks up to 2.5H. Thus, litigation of this issue, including the permissibility of grandfathering stack height increases, was foreclosed in this case.

In full compliance with the Court's remand in *Sierra Club* v. *EPA*, EPA formulated a demonstration requirement for sources seeking credit for within-formula stack height increases after October 11, 1983. *See* 40 C.F.R. § 51.1(kk)(2), 50 Fed. Reg. 27,907 (J.A. 27). EPA also reformulated its grandfathering provision for pre-January 12, 1979, stacks to take actual reliance into account. *See* 40 C.F.R. § 51.1(ii)(2)(i), 50 Fed. Reg. 27,906 (J.A. 26). In all other respects, this regulation remains unchanged. *Compare* 40 C.F.R. § 51.1(ii)(2)(i), 50 Fed. Reg. 27,906 (J.A. 26) *with* 40 C.F.R. § 51.1 (ii)(2)(i), 47 Fed. Reg. 5868 (J.A. 71).

Nonetheless, in this case, NRDC again challenged EPA's decision to grandfather all sources with pre-

January 12, 1979, stacks constructed up to 2.5H. *See* NRDC br. at 19-35. The Court rejected NRDC's attempt to relitigate this issue with respect to pre-January 12, 1979, stacks originally designed to 2.5H:

> the environmental petitioners in *Sierra Club* did not attack the formula at all and attacked the want of demonstrations only for stack height increases and instances where local authorities were concerned that the formula might overpredict GEP.

Slip op. at 42. Without explanation, however, the Court did address NRDC's arguments that the Agency did not have the authority to grandfather pre-January 12, 1979, stack height *increases* from the demonstration requirements imposed for prospective stack height increases. NRDC could and should have made this argument in *Sierra Club* v. *EPA*.[5] Thus, the Court should not have reached this issue in this case. Nor did the Agency's publication of revised stack height regulations reopen this issue.

NRDC's challenge to EPA's decision to grandfather pre-January 12, 1979, stack height increases up to 2.5H is in actuality a substantive attack on a decision made by EPA in the 1982 regulations to grandfather all stacks *in existence* as of the date of the 1979 proposal. That regulatory decision was upheld in the *Sierra Club* decision. Thus, any substantive challenge to the 1982 regulation is barred under section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1). Section 307(b)(1) of the Clean Air Act requires that petitions for review of Agency regulations be filed within sixty days of promulgation. 42 U.S.C. § 7607(b)(1). The failure of an affected entity to file a petition within this time limitation fore-

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[5] In the *Sierra Club* case NRDC challenged the grandfathering of *all* pre-January 12, 1979, sources up to 2.5H. It did not separately challenge the grandfathering of pre-January 12, 1979, stack height increases.

closes any subsequent challenge. *Natural Resources Defense Council, Inc.* v. *EPA*, 824 F.2d 1146, 1150 (D.C. Cir. 1987) (*en banc*); *Hawaiian Electric Co.* v. *EPA*, 723 F.2d 1440, 1445 (9th Cir. 1984); *City of Seabrook* v. *United States E.P.A.*, 659 F.2d 1349, 1370 (5th Cir. 1981), *cert. denied*, 459 U.S. 822 (1982). *See also Eagle-Picher Ind., Inc.* v. *EPA*, 759 F.2d 905, 911 (D.C. Cir. 1985) (interpreting a similar provision of the Comprehensive Environmental Response, Compensation and Liability Act of 1980); *Natural Resources Defense Council, Inc.* v. *Nuclear Regulatory Comm.*, 666 F.2d 595, 602 (D.C. Cir. 1981) (interpreting a similar provision of the Hobbs Act).

EPA's promulgation of revisions to the stack height regulations in 1985 does not reopen this issue for further litigation. *See, e.g., State of Ohio* v. *EPA*, No. 86-1096, Slip op. at 7 (D.C. Cir. February 12, 1988); *Montana* v. *Clark*, 749 F.2d 740 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 919 (1985). In this case, EPA was responding to a narrow remand from the Court to reconsider only certain discrete provisions of the 1982 regulations. While EPA did publish the unchanged portion of the regulation at issue, 40 C.F.R. 51.1(ii)(2)(i), it did so only to place in context the new reliance requirement added in response to the Court's remand in the *Sierra Club* decision. *See* J.A. 6, 9. The Agency did not explain the unchanged language and did not solicit comment on the issue of whether pre-January 12, 1979, sources, including sources which increased their stacks, should be subject to new demonstration requirements. *See State of Ohio* v. *EPA*, Slip op. at 7. Accordingly, NRDC's challenge to EPA's grandfathering provision for pre-January 12, 1979, stacks is untimely.

To allow NRDC to raise in this case arguments which should have been made in the *Sierra Club* litigation flies in the face of the principle of finality section 307 was designed to protect. As articulated by this Court in a similar context,

> [t]he 60 day period for seeking judicial review set forth in the Hobbs Act is jurisdictional in nature, and may not be enlarged or altered by the courts. This time limit, like other similar limitations, serves the important purpose of imparting finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of regulatees who conform their conduct to the regulations.

NRDC v. *Nuclear Reg. Com'n*, 666 F.2d at 602 (footnotes omitted).

EPA informed the Court in this litigation that the grandfathering of pre-January 12, 1979, stack height increases had been affirmed in *Sierra Club* v. *EPA*, and that subjecting affected sources to the threat of demonstrations conflicted with the Court's opinion in that case. *See* EPA br. at 34. Moreover, industry intervenors argued that NRDC's challenge to grandfathering of pre-January 12, 1979, stacks was barred by the doctrine of res judicata. *See* Intervenors' Alabama Power Co. *et al.* br. at 60.[6] In remanding this issue to EPA, however, the Court addressed neither argument.

NRDC's failure to challenge EPA's decision to grandfather pre-January 12, 1979, stack height increases in *Sierra Club* v. *EPA* forecloses it from challenging that provision in this case. Accordingly, this Court should have declined to entertain NRDC's arguments on the same grounds as it declined to revisit the issue of grandfathering of pre-January 12, 1979, stacks originally designed to 2.5H. *See* Slip op. at 42.

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[6] NRDC made no real effort to respond to these arguments in its Reply Brief. Certainly, it proffered no explanation of why it could not have raised the issue of pre-January 12, 1979, stack height increases in the *Sierra Club* v. *EPA* litigation. *See* NRDC Reply br. at 16.

III. THE COURT'S REMAND OF PRE-JANUARY 12, 1979, WITHIN-FORMULA STACK HEIGHT INCREASES HAS SERIOUS REPERCUSSIONS FOR THE AGENCY.

Pursuant to this Court's decision on January 22, 1988, EPA must reconsider its decision to grandfather all pre-October 1, 1983, stack height increases, including all pre-January 12, 1979, stack height increases which would otherwise be subject to the grandfathering provision upheld by this Court in *Sierra Club* v. *EPA*. Under the Court's decision, EPA must select one of three options: (1) design a detailed grandfathering scheme which takes into account the "variations in regulatory history and degrees of reliance" (Slip op. at 40), (2) validate the accuracy of the "good engineering practice" formulae, or (3) require demonstrations for all stack height increases.

The Court's decision has serious consequences for the Agency. First and foremost, it deprives a significant number of sources of the grandfathering protection conferred in *Sierra Club* v. *EPA*. EPA estimates that more than 150 sources are adversely affected by this provision. ICF, Inc., Final Analysis of the Proposed Stack Height Regulations, June 1985, Appendix D, Certified Index No. IV-A-3. The Agency will be required to devote substantial time and resources to addressing these sources. At a minimum the Agency will be required to conduct a comprehensive review of the circumstances surrounding all pre-January 12, 1979, stack height increases, in order to formulate a detailed grandfathering provision complying with the Court's directive. Even more onerous is a requirement that all affected sources conduct fluid modeling demonstrations in order to retain the benefit of stack height credit previously awarded. As explained by the Agency in its initial brief, EPA is aware of fewer than ten fluid modeling demonstration centers

throughout the country. *See* EPA br. at 21-22. *See also* 49 Fed. Reg. 44,883 (J.A. 6). Not only would a blanket demonstration requirement be cumbersome administratively but it would be expensive and burdensome for the affected sources.

EPA's final option would be to validate the accuracy of the "good engineering practice" formulae. This is not a meaningful alternative as it relates to sources which increased stack height up to 2.5H. EPA concedes that its refined formula of H + 1.5L is the more accurate predictor of "good engineering practice" stack height and it would be difficult, and perhaps impossible for most pre-January 12, 1979, sources to demonstrate that 2.5H is the appropriate measure. This difficulty is precisely why EPA adopted, and the Court affirmed, a grandfathering provision protecting sources which constructed stacks up to 2.5H prior to January 12, 1979, from application of the refined formula.

CONCLUSION

For all these reasons, EPA requests this Court to grant its petition for rehearing on the issue of whether pre-January 12, 1979, stack height increases may be sheltered from the demonstration requirements.

Respectfully submitted,

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